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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1791

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
(DIMITRI T. SKOURAS, etc., Real Party in Interest),
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

PRELIMINARY STATEMENT

In his Brief in Opposition, Skouras raises two new issues which he contends are dispositive of this petition. First, he argues that Petitioner's one-day delay in moving to quash the summons issued on it constitutes a substantial and independent state ground sufficient to deprive this Court of jurisdiction to review the judgment entered below. This argument, however, misstates both the law of this Court and of California.

Skouras next contends that Petitioner's status as a selling controlling shareholder of a California corporation is by itself sufficient to constitute a waiver of Section 94 of the National Bank Act. However, he articulates no waiver standard by which the bank's conduct is to be measured. Instead, his argument, like the California court decisions at issue, simply assumes that if there is a sufficient basis for in personam jurisdiction, Section 94 has been waived. The issue presented here is what standard should be applied in cases where it is claimed that Section 94 has been waived. Skouras' argument merely illustrates the need for this Court to address that issue.

II
LEGAL ANALYSIS

A. No Substantial Or Sufficient State Ground Precludes Review Of The Judgment Below By This Court

Skouras argues that Petitioner's service of its motion to quash on October 17 rather than on October 16, 1978, constitutes a waiver under California law of Petitioner's right to assert Section 94 as a bar to the underlying action. He then leaps to the conclusion that the court of appeal so ruled and that this constitutes a sufficient and substantial state ground sufficient to support the judgment below thus depriving this Court of jurisdiction to review that judgment. It is clear, however, that Skouras has not only misconstrued the law of this Court, but has misstated the law of California.

"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia,* 343 U.S. 541, 547, 96 L.Ed. 1130 (1952). Where, however, the purported state ground is not "substantial or sufficient," it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Durley v. Mayo,* 351 U.S. 277, 281-282, 100 L.Ed. 1178 (1956), quoting *Klinger v. Missouri,* 80 U.S. (13 Wall.) 257, 263, 20 L.Ed. 635 (1872). Skouras' argument is therefore meritless if Petitioner's one-day delay in serving its motion is not a "sufficient and substantial" state ground for upholding the judgment below. Under California law, it is not.

Respondent cites no California authority for his proposition and, in fact, California law is completely to the contrary. California courts have consistently held that a delay of several days in serving a motion to quash the summons is not, by itself, sufficient to deprive a litigant of the right to object to improper venue.

For example, in *Wrenne v. Huchting,* 51 Cal.App. 218, 196 P. 295 (1921), the defendant had served a notice of hearing, a demurrer and a motion to change venue the day after his time within which to respond to the complaint had expired, just as in the instant case. The California trial court denied the motion to change venue because of late service of the moving papers. The California court of appeal reversed the trial court's order, holding that the one-day lapse "was no justification for the [lower] court's action," and constituted an abuse of the trial court's discretion. *Id.* at 219. Similarly, in *Bank of Haywards v. Kenyon,* 32 Cal. App. 635, 637, 163 P. 869 (1917), the court of appeal held

that it was an abuse of the trial court's discretion to strike an answer which had been filed one day late and enter a default judgment against the defendant.

The California courts have also consistently declined to dismiss petitions for writs of mandamus seeking to overturn trial court rulings refusing to quash summons for lack of jurisdiction simply because the petition was untimely filed by a matter of a few days. *E.g., Quattrone v. Superior Court,* 44 Cal.App.3d 296, 301, 118 Cal.Rptr. 548 (1975); *Cornell University Medical College v. Superior Court,* 38 Cal.App.3d 311, 315, 113 Cal.Rptr. 291 (1974).[1]

In light of this authority, which was cited to the California courts by Petitioner and not contradicted by Skouras, it cannot be said that the decision below was based on the procedural ground of a one-day delay in serving the motion to quash the summons. As a matter of law, that delay could not preclude Petitioner from asserting Section 94. Skouras' argument is therefore untenable and will not defeat the jurisdiction of this Court. *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 164, 61 L.Ed. 644 (1917).

Moreover, a state procedural rule which is discretionary rather than mandatory, and thus not consistently applied, does not bar review by this Court. *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 233-234, 24 L.Ed.2d 386 (1969); *Barr v. Columbia,* 378 U.S. 146, 149, 12 L.Ed.2d 766 (1964).

[1]Indeed, the Section 94 defense need not even be raised by a bank in its initial appearance. *E.g., Beal v. Third National Bank,* 350 So.2d 840, 841 (Fla.App. 1977). If the California courts did act on the basis suggested by Skouras, certiorari would be equally necessary to prevent inconsistent results among the states.

Therefore even if the petition for writ of mandamus was denied on the grounds of late service of papers in the trial court, such a decision could not be other than the discretionary application of a procedural rule which would not bar review by this Court.

Skouras cannot avoid the issue presented by a procedural smokescreen. Clearly, the California courts found against Petitioner on the federal ground at issue: alleged waiver of Section 94. That decision is, of course, subject to review by this Court.[2]

B. Certiorari Is Necessary To Establish Definitive Guidelines For Determining Whether A Waiver Of Section 94 Has Occurred

Skouras argues that a waiver of Section 94 may be found merely because of Petitioner's status as a selling controlling shareholder of a California corporation. The attempted justification for this position is his further contention that in selling the shares of the investment corporation,[3] Petitioner "was acting not in its capacity as a bank" but as a business. Skouras seeks to distinguish between the various activities engaged in by banks, and have

[2]Neither of the cases cited by Respondent, *First National Bank of Charlotte, North Carolina v. Morgan,* 132 U.S. 141, 33 L.Ed. 282 (1889), and *Commercial Casualty Ins. Co. v. Consolidated S. Co.,* 278 U.S. 177, 73 L.Ed. 252 (1929), are on point since both involved situations where Section 94 was raised for the first time after a judgment on the merits had been entered by the trial court. *See, DeDond v. Pullman Co.,* 53 F.2d 94 (E.D.N.Y. 1931).

[3]Skouras does not contest that all of the activities relating to the sale by Petitioner of the investment corporation's stock transpired in Louisiana rather than in California. The purchase of the stock three years earlier is irrelevant as that transaction is not in dispute.

California courts hold that "banking" activities are entitled to the protection of Section 94 but "business" activities are not.

Preliminarily, it should be noted that Skouras' exceedingly myopic view of the business of banking has no basis in fact. Banks do not just accept deposits and make loans. *Melton v. Unterreiner*, 575 F.2d 204, 207 n. 4 (8th Cir. 1978). Rather, one of the major premises of the banking business is investment of deposits to achieve a return in excess of what must be paid to the depositor. Bank trust departments are also required to make substantial investments in securities. *See generally*, Hunsicker, *Conflicts of Interest, Economic Distortions, And The Separation Of Trust And Commercial Banking Functions*, 50 So. Calif. L.Rev. 611, 666 (1977); Greenspan, *Bank Holding Companies: Competition, Capital, and Banking Acquisitions*, 90 Banking L.J. 560, 575-577 (1973). Petitioner's sale of shares in an *investment* corporation is therefore as much a part of the banking business as is making loans. Indeed, 15 U.S.C. Section 672(b) explicitly authorizes a bank to acquire shares of small business investment corporations like First Southern as part of its normal banking activity.

Moreover, Section 94 does not discriminate among a national bank's activities. It does not provide that a national bank may only be sued in the county where it is established, except where the subject of the suit is investments. Rather, it contains an absolute and unqualified prohibition against suit in other jurisdictions. *E.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 48 L.Ed.2d 540 (1976) (securities law violation alleged); *McClung v. LaSalle National Bank of Chicago, Illinois*, 387 F.Supp. 977, 979 (D. Iowa 1975) (securities law violation). Skouras' attempt to amend the statute to suit his purposes cannot succeed.

With respect to certiorari, however, Skouras' argument is very revealing. Significantly, he never discusses the proper framework for resolution of the waiver issues and is unable to suggest what standard California courts apply. The reason is clear: there is no waiver standard in California against which to measure conduct in a particular case, other than a "doing business" standard. By his "controlling shareholder" argument Skouras, like the California courts, simply assumes that if the bank is doing sufficient business in the state for in personam jurisdiction to attach, Section 94 has been waived.[4] The case relied on by Skouras for the contrary proposition,[5] *Michigan Nat. Bank v. Superior Court*, 23 Cal.App.3d 1, 99 Cal.Rptr. 823 (1972), is a striking illustration of this approach, holding:

> In this case it is concluded that the Michigan bank, by soliciting with its forms the refinancing of sales of

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[4]Actually, even that test is not met here. In *Shaffer v. Heitner*, 433 U.S. 186, 214-16, 53 L.Ed.2d 683 (1977), this Court held that an officer or director of a Delaware corporation who was not a resident of that state could not be sued in Delaware when the activities which allegedly caused injury to the corporation took place in another state. That reasoning forecloses Skouras' contention that Petitioner's status as a corporate shareholder constitutes submission to the jurisdiction where the corporation was incorporated.

[5]Skouras also relies on *Kaiser Aetna v. Deal*, 86 Cal.App.3d 896, 899, 150 Cal.Rptr. 615 (1978), for his contention that the finding of waiver here was "business" rather than "banking" activities. Since waiver was not even an issue on appeal in that case, Skouras has misrepresented its holding.

> airplanes, sold and to be harbored in this state, is not only doing business in this state so as to be subject to the jurisdiction of the courts of this state in disputes involving such transactions, but has also waived the requirements of section 94 insofar as such suits are concerned. *Id.* at 13.

As noted in the petition in the instant case (pages 7-8), that formulation is clearly contrary to the standard adopted by the circuit courts of appeals.

III

CONCLUSION

A divergence of opinion clearly exists between the California courts of appeal and the circuit courts of appeals, over the parameters for establishing that a national bank has waived its venue rights under Section 94 of the National Bank Act. This divergence can only be rectified by an option of this Court.

The facts of the case at bar, involving a suit against a national bank far away from its place of establishment over a transaction no part of which occurred within the State of California, vividly illustrates the erosion by California courts of the congressionally-mandated Section 94 privilege accorded national banks. It is left to this Court to prevent that erosion and to establish clear standards for determina-